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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 644

CHARLES W. PADGETT, *Petitioner,*

v.

BUXTON-SMITH MERCANTILE COMPANY and FLOYD R. EHRMANN, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The respondent has no objection to the portions of the Petition entitled "Opinion Below," "Jurisdiction," and "Constitutional" (Pet. 1, 2, 3). The respondent is dissatisfied with the petitioner's "Questions Presented" and "Statement of the Case."

QUESTIONS PRESENTED

The sole question presented by this Petition for Writ of Certiorari is whether this Court will review a case in which the Court of Appeals for the Tenth Circuit affirmed an order of the United States District

Court for the District of New Mexico overruling and denying petitioner's challenge to the jury array where petitioner alleged that those occupying the position of laborers for hourly wages or otherwise engaged in actual manual labor were not properly represented and that the array was not representative of a cross-section of the population of the State of New Mexico from an economic and social viewpoint.

STATEMENT OF THE CASE

Respondents object to petitioner's Statement of the Case in that it is composed in large part of argument and of allegations unsupported by any facts before the trial court. At the hearing upon petitioner's challenge, the trial court received into evidence, without objection, the facts set forth in the challenge and in the supplemental statements (R. 37). The challenge included as an exhibit lists of petit jurors, giving for each his name, address, age, length of time in New Mexico, and occupation. The challenge itself is lengthy, and contained allegations based primarily upon speculation and upon information and belief (R. 5-11). The supplemental statements were similar (R. 16-18). Petitioner's Statement of the Case, however, assumes that the truth of the allegations was admitted (Pet. 7, 8). This was clearly not the trial court's ruling (R. 30, 37). The only evidence before the court was, in addition to the lists of petit jurors, the statistical abstract of employment and income in New Mexico, the testimony of Mr. William D. Bryars, and various documents relating to the selection of the panel. Based upon the evidence presented to the court, a fair statement of facts pertinent to this petition is as follows:

1) On March 10, 1960, petitioner filed a challenge to the jury array, alleging generally that the jury panel did not properly include persons in the position of laborers for hourly wages or otherwise engaged in actual manual labor and was not representative of a cross-section of the population of New Mexico (R. 5-11).

2) Several lists of petit jurors were submitted in support of the challenge (R. 19-26).

3) A hearing on the challenge was held March 14, 1960, at which time petitioner presented in support of his challenge statistics showing that the bulk of the population in New Mexico received an income of less than $10,000 (R. 33-37). Petitioner also introduced the lists of petit jurors and called as a witness Mr. William D. Bryars, Clerk of the Court (R. 37-46).

4) Mr. Bryars testified that, in selecting the jury array, he and the jury commissioner wrote to several so-called key men and women in each county in the state and requested a list of persons eligible to serve as jurors (R. 38). When the lists were submitted, each person named was sent a questionnaire to determine that he was qualified and not exempt from service (R. 38). When the replies to the questionnaires were returned, the clerk and the commissioner attempted to select from them an array fairly opportioned as to race, social and economic groups and sex (R. 39). The names were typed on slips of papers and placed in the jury wheel from which the panel was drawn (R. 39). The letters sent the so-called key persons and the prospective jurors and the orders of the court pertaining to the selection of the jury array were also introduced into evidence (R. 54-59).

5) No further evidence was introduced by petitioner; and the court orally overruled the challenge on March 14, 1960, and entered its order April 28, 1960 (R. 30-31, 49).

ARGUMENT

Point I. There Is No Ground for Review By This Court Since Petitioner Failed to Establish Any Denial of a Constitutional Right

Petitioner is seeking a review of the decision of the United States Court of Appeals for the Tenth Circuit upon the constitutional ground that he has been deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States (Pet. 3). In particular, petitioner has challenged the use by the clerk and the jury commissioner in the District of New Mexico of various unidentified persons in each of the counties of the state as a source for names from which the jury panel was selected (Pet. 9). It is alleged that the machinery for the selection of the jury panel is such that they could, and did, discriminate against persons of a lower economic status (Pet. 12). Petitioner is attempting to bring himself under the rule of such cases as *Smith* v. *Texas*, 311 U.S. 128 (1940); *Thiel* v. *Southern Pacific Company*, 328 U.S. 217 (1946); and *Avery* v. *Georgia*, 345 U.S. 559 (1953).

The difference between those cases in which challenges to the jury array or panel have been upheld and the one here is that in the former there was presented some evidence from which the trial court could find discriminatory practices, while here the allegations of the petitioner were unsupported by any evidence. Although petitioner was afforded a hearing on

his challenge, he failed to show any evidence of economic discrimination. While the challenge did attempt a limited examination of the jurors who made up the panel (R. 5-16), petitioner neglected to make any analysis of the entire jury array or, for that matter, to examine the list of jurors included in the array or the questionnaires submitted by them (R. 52). He rested on the allegations of his challenge; and these, unsupported by evidence, are not sufficient to support the challenge to the jury array. *Glasser* v. *United States*, 315 U.S. 60 (1942).

Virtually identical to this case is *Dow* v. *Carnegie-Illinois Steel Corporation*, 224 F. 2d 414 (3d Cir. 1955), cert. den. 350 U.S. 971 (1956), in which the court affirmed the denial by the trial court of plaintiff's challenge to the jury array and to the method of selection. While the court there recognized the importance of a representative jury, it was held that the plaintiff had not produced sufficient evidence to support the challenge. This is in accord with *Thiel* v. *Southern Pacific Company*, *supra*, where the challenge was upheld after testimony from both the clerk and the jury commissioner that there had been an intentional and deliberate exclusion from jury lists of all persons who worked for a daily wage. Any such evidence of discrimination is completely lacking from the record in this case. To the contrary, the testimony of the clerk was that a deliberate attempt was made in selection of the jury array to get a cross-section of New Mexico fairly apportioned as to race, social and economic groups and sex (R. 39). This testimony was unrefuted and no evidence was presented to support petitioner's allegation that there was discrimination.

Petitioner was quite clear in the hearing before the court that the challenge was not directed toward the selection of names from the jury wheel, but to the manner in which the names were placed in the wheel, i.e., to the jury array (R. 47-48). Such analysis as petitioner made of the jury lists, however, went only to the petit jurors (R. 8-27). Even as to these, petitioner conducted a cursory examination. His excuse for lack of preparation was the short interval between the drawing of the petit jury and the notice of trial (Pet. 8). He neglected to mention that the jury array which he was challenging was selected November 10, 1959 (Pl. Ex. 3; R. 58-59). Even if he be correct that there was not sufficient time between the drawing and the notice, he has shown no reason why he could not have examined the array prior to the notice of trial. Furthermore, while the array from which the panel was drawn contained 810 names, only 66 names were drawn for the petit jury (Pl. Ex. 3; R. 58; R. 22-27). Petitioner never attempted to investigate the array except for the 66 petit jurors. Had he done so and made some showing of discrimination, he might have come within the decisions of this Court. Having failed in this, he is in no position to petition this Court for review.

Point II. The System of Jury Selection Used in the District of New Mexico Contains No Inherent Discriminatory Practices Which Should Be Reviewed By This Court

The statutory provisions for the selection of grand and petit jurors in the district courts are general and, by their nature, leave much to the discretion of the clerk and the jury commissioner. Except that the names shall be placed in the jury box without regard to party affiliations and that the jurors shall be selected

from such parts of the district as the court directs so as to be most favorable to an impartial trial, no requirement is made as to the source from which the names of qualified jurors shall be taken. 28 U.S.C. §§ 1864, 1865.

In the present case the clerk and the jury commissioner, in an effort to obtain state wide representation, sought the assistance of persons living in each county of the state. Had they merely sought the required number of names in this manner and placed the names in the jury box without further action they might properly be subject to attack for delegating their duties. This, as the record clearly shows, was not the case. After receiving the names of several thousand prospective jurors, they sent questionnaires to each of them (R. 38). When the questionnaires were returned and examined, approximately 800 names were selected and placed in the jury box (R. 39, 40). This testimony of the clerk, which was not contradicted, established that the selection was not by a "secret, unofficial group" as petitioner argues (Pet. 2).

Petitioner has not presented a case such as *Avery* v. *Georgia*, *supra*, where the mechanics for selection themselves were faulty. Nor has petitioner shown a deliberate attempt on the part of the clerk and the jury commissioner to exclude certain classes from the juries, the practice which was condemned in *Thiel* v. *Southern Pacific Company*, *supra*. The procedure presently used for jury selection in the District of New Mexico was previously approved by the Court of Appeals for the Tenth Circuit in *Windom* v. *United States*, 260 F. 2d 384 (10th Cir., 1958). It is similar to that approved by the Court of Appeals for the Third

Circuit in *Dow* v. *Carnegie-Illinois Steel Corporation*, *supra*, and by the Court of Appeals for the Eighth Circuit in *Walker* v. *United States*, 93 F. 2d 383 (8th Cir., 1937), cert. den. 303 U.S. 644 (1938). Petitioner offers no authorities for the proposition that such method is improper. If, then, the system itself does not contain inherent weaknesses intended to facilitate discrimination, petitioner's argument, if it is to have any validity, must rest upon a showing that the system has been discriminatory as applied. *Smith* v. *Texas*, *supra*. Respondents have discussed above the application of this system, and, we submit, petitioner has failed completely in showing discrimination or exclusion.

Point III. The District Court Did Not Err in Refusing Petitioner's Motion to Interrogate Each Person on the Jury Array and in Refusing to Subpoena the Jury Commissioner

Petitioner makes the additional point that the court improperly refused him permission to interrogate the key men, the jury commissioner and the panel (Pet. 2). This assertion is based on petitioner's claim that the panel was admittedly "suspect" (Pet. 2). Respondents submit these arguments were adequately met in the opinion rendered by the Court of Appeals (Pet. App. 5).

The term "suspect," which petitioner uses, was taken out of context from the remarks made by the court at the hearing of March 14, 1960. The court was discussing petitioner's assertion that the panel was suspect because two members on the jury panel from Valencia County were bankers (R. 48). The court went on to point out that this proved nothing where the petitioner had not attempted to show the popula-

tion of that county or the number of jurors on the array from that county. It is clear from the order entered by the court that it did not consider the panel to be suspect (R. 30, 31).

As for the examination of the panel and the jury commissioner, petitioner is complaining that the court did not do what he could have done for himself. The court stated that it would not issue a subpoena for the jury commissioner unless some showing was made that he had acted improperly in fulfilling his duties (R. 50). As the court of appeals pointed out, the court did not, and could not, have prevented petitioner from bringing in the jury commissioner to testify. So far as the jurors are concerned, the court offered petitioner the opportunity to prepare questions which might be propounded to the jury (R. 49). Also, the questionnaires of all persons included in the jury array were available for examination (R. 52). Petitioner made no effort to avail himself of either opportunity to support his challenge. Since petitioner did not prepare his own case, he is in a poor position to complain that the court did not do this for him.

CONCLUSION

Petitioner has failed to show faults in the system of jury selection used in the District of New Mexico or any discrimination or exclusion on the part of the clerk of the court and the jury commissioner in select-

ing the jury array. Accordingly, the petition should be denied.

Respectfully submitted,

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